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Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF, ETC., APPELLANTS,

vs.

THE UNITED STATES.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF, ETC., APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANTS.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Appellants.

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REPLY BRIEF FOR APPELLANTS.

By leave of the court this brief is filed in reply to the several briefs filed by the United States.

It is stated by the defendants that these appellants received their allotments of lands *from the United States*. This idea may, to a greater or less degree, have influenced the judgment of learned counsel upon other points, and should therefore be corrected.

All the Title to the Cherokee Lands and All the Right to the Cherokee Funds in the Cherokee People—the United States Without Interest in Either.

By the treaty of 1828 (7 Stat., 311) the United States granted *to the Cherokee people, in fee simple,* the lands involved in this controversy. No part of this title had ever passed out of the Cherokees up to July 1, 1902, the date of the Cherokee agreement. Therefore, the appellants did not receive their allotments from the United States, but the act of allotment was a simple partition among themselves, made in pursuance of section 20 of the treaty of 1866 (14 Stat., 799).

Citizenship.

Defendants' brief declares that the Cherokee Indians were not made citizens of the United States by the act of March 3, 1901.

This denial is based upon the theory that as the act of March 3, 1901, was an amendment to the general allotment act of February 8, 1887 (24 Stat., 388), it was modified by certain conditions named in that act affecting other Indians for whom the act provided a method for acquiring citizenship. That act provided that citizenship might be acquired by *two* classes of Indians. The first of these was composed of Indians to whom allotments should be made and patents issued, and with the issuance of the patents such patentees became, *ipso facto,* citizens of the United States. The second class of Indians who might acquire citizenship, were those who, not having allotments, and therefore not receiving patents, should separate themselves from an Indian tribe and adopt the habits of civilized life. As to both classes it was required that they must have been born within the territorial limits of the United States.

The wording of the act is that each of such persons "is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens."

The act of March 3, 1901, added after the words "civilized life" in section 6 the words "every Indian in the Indian Territory," and these words immediately preceded the language, "is hereby declared to be a citizen of the United States." So that the act of March 3, 1901, so far from requiring the Indians in the Indian Territory who were to become citizens to have received allotments and patents, or to have separated themselves from a tribe, and adopted the habits of civilized life, omitted even the condition of the original act that the Indian must have been born within the territorial limits of the United States. In other words, not a single condition was attached to the Indian in the Indian Territory, except merely that of residence in the Indian Territory.

The defendants have overlooked the fact that the act of February 8, 1887, is an allotment act, and section 8 thereof excludes, not the Indians, *but the territory* of the Cherokees and other tribes mentioned therein, from partition. The act of March 3, 1901, amending this allotment act, has reference solely to citizenship, which it bestows upon all Indians in the Indian Territory.

The sixth section of the allotment act of February 8, 1887, was further amended by the act of May 8, 1906, and the eighth section of the original act was allowed to remain unrepealed, for the reason that the whole scheme of the allotment act of February 8, 1887, related to the future allotment to Indians other than those living in the excepted territory as they should, from time to time, take allotments or adopt the habits of civilized life. That provision has no relation whatever to the act of March 3, 1901, which, in unmistakable terms, had already conferred citizenship upon the Cherokee Indians; and it is wholly immaterial whether that amendment was retained in the general allotment act as last

amended, for the reason that citizenship once granted to appellants could never be taken from them.

Heff *vs.* U. S., 197 U. S., 488.

The Effect of Conferring Citizenship.

The defendants in their brief insist that such citizenship as was conferred upon the Cherokees by the act of March 3, 1901, was a limited or qualified one. We observe that the act of February 8, 1887, adds to the declaration that the Indians within its contemplation shall be citizens of the United States that they shall be "entitled to all the rights, privileges, and immunities of such citizens." Thus given *all* the rights and *all* the privileges and *all* the immunities, how may it possibly be said that the citizenship conferred upon them was limited or qualified?

The brief for the defendants then asserts that the conferring of citizenship did not invest the Indians with any rights invoked in this litigation that they did not otherwise have. We are not insisting that the Indian was not a "person" within the meaning of the Fifth Amendment to the Constitution, who might not be deprived of his property without due process of law, but we are insisting that, as was declared by Mr. Justice Brewer in the Heff case, the Indian had been emancipated from Federal control, and that the United States could not reassume its guardianship over him under the guise of which it had assumed for so many years to govern and supervise both the Indian and the Indian's property.

This same general allotment act of February 8, 1887, declares that any of the persons becoming citizens under its provisions do so without in any manner impairing or otherwise affecting their right to tribal or other property. The whole contention against the appellants in this case is that the United States possesses, by reason of its immemorial treatment of the Indians, the power to pass different laws for

their government and the control of their property than those which apply to white citizens of the United States.

All Cherokee Indians in the Indian Territory, being citizens on July 1, 1902, and each of them having an individual right in the communal lands and funds belonging to the former nation of which he had been a member when the act of July 1, 1902, was passed, that act was submitted to them as the owners of the communal lands, as a scheme for the partition of those lands, so that each individual Indian might receive his share thereof. Congress did not assume to declare how the lands should be divided, but merely offered a plan which was not to be effective until these citizens of the United States acceded to it, which they did by a popular vote.

The Act Appointing the Dawes Commission.

The act of July 1, 1902, was merely a step in the direction clearly indicated as the general policy of the Government in providing for the appointment of what is known as the Dawes Commission, the purpose of which was declared to be "*the extinguishment of the national or tribal title;*" and this extinguishment was to be "either by cession of the same or some part thereof to the United States, *or by the allotment and division of the same in severalty among the Indians.*"

The act of July 1, 1902, not providing for a cession to the United States, accomplished the extinguishment of the tribal title, therefore, by allotment and division in severalty among the Indians, and it limited the individuals to those living on September 1, 1902.

We desire to impress upon the court that the act of July 1, 1902, was not simply an act of Congress; that it was by its terms to be an agreement among the owners of these communal lands, because it submitted to them the plan of dis-

tribution, the time of distribution and the persons or classes of persons to whom the distribution should be made, and provided that it should not be effective unless these individual citizens, who were the owners of the property, assented to it, as we have stated.

By sections 25, 26, and 31 it was declared that all persons who should become enrolled for allotment, living on September 1, 1902, and applying for enrollment prior to October 31, 1901, *and none other* should share in either the lands or the funds of the tribe or the proceeds of certain lands reserved from allotment. We do not wish to be understood as saying that the act in so many words declared that the community should terminate on September 1, 1902, but because it fixed that date as one on which a Cherokee must be living in order to share in the lands and funds of the former tribe, and because it provided that the lands of those who should receive allotments under the act, together with the proportionate share of such allottees in the other tribal property, *should descend to their heirs,* instead of reverting to the community, and because this was assented to by the common owners, it necessarily terminated the communal title as of that date, and invested those Cherokee citizens of the United States living on September 1, 1902, with an individual right to every particle of the lands and funds and other property of the Cherokee Nation. For, prior to that date, if one died, his share reverted to the community of which he was a member, and there was no such thing as an estate of inheritance. Some day had to be fixed on which an interest in communal property should be transformed into an estate of inheritance. Manifestly some children born in the future would never share in the communal property and funds of the nation as communal owners, but to all those who were thereafter to be born, there was given what no Cherokee citizen ever had before, the right of inheritance.

Continuance of Tribal Government.

Much stress is laid by the defendants upon a resolution and act of Congress declaring that the tribal government should be extended "for all purposes under existing law" or "for all purposes authorized by law," and it is sought to have the court hold that with this slender thread Congress yet retained its old control and supervision of these Indian citizens, so that it might still be under *honorable* obligations, and yet not under *legal* obligations, not to attach other conditions than those named in the grant. We have urged, and we insist with much earnestness, that there was no real tribal government; that for purposes of convenience, for instance, as to the management of the schools among the Cherokees and the maintenance of their public buildings and of other institutions, some one familiar with the conditions should be retained or appointed. What was more appropriate than that, though placed in subjection to the Secretary of the Interior in every single particular, the former principal chief of the tribe should be named as such agent, and his appointment assented to by the Cherokees? That he was completely under the authority of the Secretary of the Interior is demonstrated in the provision giving power to the Secretary to remove him and appoint another.

It was said by Chief Justice Nott, of the Court of Claims, in the case of the Cherokee Nation *vs.* The United States (40 Ct. Clms., 330):

> "In this condition of affairs the court must regard the Cherokee nation as in a condition somewhat analogous to that of a trustee or receiver that has become insolvent."

It was suggested from the bench, in the oral argument of this cause, that the former Cherokee Nation was to be treated as a defunct corporation, having assets upon which it was necessary yet to administer. And the latter suggestion prop-

erly describes what the defendants choose to call "the tribal government of the Cherokee Nation."

In this connection it may be pertinently inquired how there could be a tribe made up of citizens of the United States? When every Cherokee Indian in the Indian Territory was made a citizen of the United States, and thereby removed from under the guardianship of Congress, there could be no aggregation of such persons over whom Congress could have plenary control, such as it had exercised over Indian tribes. It is impossible to conceive of a tribe of Indians subject as a body to the plenary control of Congress, when every individual member of that body was as free in the exercise of all the rights of citizenship as any citizen of the United States. And it is evident from this that it was never the purpose of Congress to continue a tribal existence which would either invest any former representatives of the defunct tribe with the power to legislate as to the rights of its members, or to invest Congress with that supervisory control either to protect or oppress them, which the defendants so frequently invoke. Moreover, if this alleged continuation of the tribal existence could have so revived the former community as either to give it power, through unauthorized representatives, to surrender the rights of citizens of the United States which had been previously established by a popular vote, or to give Congress the power of plenary control over the aggregation in such a way as to deprive the citizens of their property, it, too, accomplished the taking of the property of these citizens without due process of law, and was therefore in violation of the fifth amendment.

The first proposition of defendants in their supplemental brief at page 35, we deny.

No case is produced to show that Congress can treat full-blood Indians with the absolute injustice claimed by defendants.

If the proposition is true at all in any sense, it is certainly not true with reference to those persons who are sim-

ply Indians by blood and are not Indians in law, and no case can be produced showing that Congress can, by acts subsequent to the grant, control or affect a title that has vested in an Indian.

In Jones *vs.* Meehan (175 U. S., 1, p. 32), the court states its conclusion to the effect that after the grant to a tribal Indian not a citizen of the United States vesting title in him, neither Congress nor the executive department could add any restrictions of any nature whatsoever upon this title and further—

> "The construction of treaties is the peculiar province of the judiciary, and except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, *or to affect titles already granted under the treaty itself.*"

It, therefore, held that the resolution of Congress passed subsequent to the granting of title and the proceedings of the Interior Department were of no effect upon the previously acquired rights of the plaintiff.

This, of course, is not a case "purely political," because the tribe had been absolutely abolished and the acts of 1904 and 1906, of which we complain, do not purport to be directed at the tribe, but only at certain members of the tribe designated according to the quantum of Indian blood.

The defendants assert that the rights of third parties had intervened in the case of Jones *vs.* Meehan, which is true, but the decision of the court is based upon principles wholly distinct from the theory that the rights of third parties had intervened. The decision is based solely upon the ground that when the title vests in an Indian who is not even a citizen of the United States, and yet, in full tribal relations, he acquires such right as the government in none of its departments can in any way divest him of.

The defendants assert that for forty-four years it was unlawful for any individual Indian to sell his lands and they

quote several acts of Congress. They do not quote, however, any decision sustaining the legality of such act of Congress, and we assert that there is no case which denies to an individual Indian in whom property has vested in fee simple, the right and power to use and enjoy it in the same manner as other persons. Since 1834 Congress has not even pretended to possess the right to divest an individual Indian of property vested in him either by treaty or patent.

No such right was "expressly assumed" in Jones *vs.* Meehan, nor is there any reason whatever for asserting, as the defendants do, that Congress had either by contemporaneous or subsequent act, the power to restrict the right of the Indian grantee to dispose of his land.

By the act of June 30, 1834, Congress omitted all reference to the individual Indian in its enactment relating to the purchase or sale of Indian lands, thereby confining the control of Congress solely to the tribal lands owned and controlled by a tribe of Indians.

The defendants quote Smith *vs.* Stevens (10 Wall., 321) in support of their contention. The facts in that case are as different from the case at bar as is possible to be. It differs from our case in the following particulars:

1. They were tribal Indians.

2. They were not citizens of the United States.

3. The allotments were "reserved out of the quantity ceded by the nation to the United States,' so that the allottees took by the treaty only the Indian title of occupancy.

4. The treaty actually prohibited alienation.

5. The act of May 26, 1860, transferred the title of the United States to the allottees and at the same time provided the only scheme by which these allotments might be alienated through the Secretary of the Interior.

6. Smith's deed did not in any way comply with the terms of the act under which alone a title could pass.

The defendants cite from the case of the Kansas Indians. We quote the following from the opinion in the same case, which shows conclusively that they are tribal Indians:

> "If they have outlived many things, they have not outlived the protection afforded by the constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, '*but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from State taxation.*"

The defendants state that the Secretary of the Interior on January 15, 1902, fixed the date for closing the Cherokee roll as of July 1, 1902, under the authority of an act of Congress of March 3, 1901 (31 Stat., 1077), and that the act of July 1, 1902, the Cherokee agreement, changed the date so fixed and moved it up to September 1, 1902. They then conclude that if Congress had the right to change the date once so fixed and move it up to September 1, 1902, it must also have had the right, by the acts of April 26 and June 21 1906, to move it up to March 4, 1906.

In reply to which we respectfully submit the following facts, evidenced by public records:

At the time of the passage of the act, authorizing the Secretary of the Interior to fix the date for closing the rolls, in the event a date could not be agreed upon with the Cherokees, there was pending a proposed agreement which had been submitted by Congress to the Cherokees for the allotment of their lands, and one of the provisions of which was that the roll should be made as of April 1, 1900 (31 Stat., 848). This proposition was adopted by Congress March 1, 1901, but was rejected by the Cherokees on April 26, 1901, by a majority of 1,023 out of a total vote of 5,569 cast at the election held for the purpose. (See letter from Secretary of Interior in H. R. Doc. 552, 57th Congress, 1st session).

Further, on December 19, 1901, and before the Secretary had attempted, under the above authority, to fix any date for closing the roll, the Cherokees, in turn, submitted to Congress an allotment scheme of their own providing for the division of their common estate in accordance with the 20th article of the treaty of 1866. (See H. R. Doc. 552, 57th Congress, 1st session, pages 2 to 10.)

We beg to call special attention to sections 33 and 34 of this proposition of the Cherokees, which provided:

> "The rolls of membership upon which final allotment of all the common property of the Cherokee Nation shall be made shall be as of the date of the final ratification of this plan of allotment and the names of all persons then living and entitled to receive allotment shall be placed on said rolls.
>
> *"No child born to any member after said date shall be entitled to a per capita share of said common property."*

Now, while this proposed agreement was pending before Congress, the Secretary undertook, on January 15, 1902, in accordance with the above authority, to fix the date as of July 1, 1902, for closing the rolls

The defendants assert that it must be presumed that the prerequisite as to the fixing of the date by the Secretary had been complied with in the absence of proof to the contrary, and we respectfully submit that this presumption is overcome by the mere reading of the above-mentioned public documents.

But, before this date, which the Secretary attempted to fix, became effective, and in disregard of his action, in attempting to fix the date without the consent of the Cherokees, the United States accepted the proposition of the Cherokees by the act of Congress of July 1, 1902, and which became the Cherokee agreement, and by which the first and only authoritative date, that of September 1, 1902, was fixed, as of

which the Cherokee common property should be divided and become individual estates of inheritance.

Thus the inference to be drawn from the statement, that Congress had the right to change the date from September 1, 1902, and move it up to March 4, 1906, is entirely unjustifiable.

This date of September 1, 1902, provided for in the Cherokee agreement, as of which the roll should be made, has not been changed nor attempted to be changed. The roll was made as of that date, and upon that date 37,561 individual estates became vested in the 37,561 persons whose names appear on the Cherokee roll as of that date, and which cover all the property theretofore owned by the Cherokee people or nation, and these particular persons numbering 37,561, or the heirs of those who have since died, have continued from that date to the present time to own all of that property.

What Congress has attempted to do, by the act of June 21, 1906, is to enroll 5,610 additional persons and transfer to them practically one-sixth of the entire estate of each of those who became vested with the entire property and took allotments under the original agreement, and this transfer is to be made by act of Congress, without the knowledge or consent of the owners of the property, to persons not even in existence when the title was originally vested.

Moot Question.

Speaking generally from the decisions of this court on the subject, a moot case is one in which no substantial injury is alleged and no substantial relief can follow—one wherein a judgment would not be a finality, but a mere expression of opinion, to which effect could not be given, or one wherein some event has intervened which would render impossible a compliance with the court's judgment.

This jurisdictional act was passed because Brown and Gritts in the one case and Muskrat and Dick in the other had a cause of action against certain administrative officers of the Government, and had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from proceeding under the acts complained of, on the ground that those acts were violative of the constitutional rights of the respective petitioners. As is shown in one of the briefs, this was given in the debate in the Senate as the reason for the establishment of the jurisdiction now invoked, and the establishment of this jurisdiction avoided the multiplicity of suits which must have ensued if all the 37,561 allottees had sought, in individual actions, to protect and enforce their rights under the act of July 1, 1902.

Now as to the effect of the court's decision: We have insisted that the United States has supplied this method of determining the rights of these appellants instead of the method they adopted when they instituted their suits in the Supreme Court of the District of Columbia.

The officer against whom the suit was brought in the District of Columbia was the Secretary of the Interior, in his official and not in his personal capacity. He was sued as an agent or representative of the United States. So by the act of March 1, 1907, the United States elects to "stand in judgment" in the place of the Secretary of the Interior, and the act provides, in order that that may be done, that the United States alone shall be made the defendants.

As to the effect of this we cite Minnesota *vs.* Hitchcock, 185 U. S., 373-387. The court there says:

> "But it may be said that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in this suggestion.

> But Congress has, for the Government, assumed a personal responsibility.
>
> "It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purpose of the litigation, stand as the real party in interest."

The court then declares that the dispute is one affecting the title to real estate.

So here, whatever is attempted to be done of which we complain, is attempted to be done by the Congress of the United States. Whatever injury these appellants might suffer if the acts be held effective is occasioned by the United States.

In the case of Stevens *vs.* The Cherokee Nation (174 U. S., p. 457) the court declared that the only question submitted was the constitutionality of the act, and the court held it to be constitutional.

In the Cherokee Intermarriage cases (203 U. S., p. 76) the court, without naming an individual defendant, adjudged that intermarried white citizens of a certain class were entitled to share in the properties of the nation, while intermarried white citizens of another class were not so entitled.

Defendants contend that this is a moot case because the act of May 27, 1908, re-enacts, in part, the obnoxious provisos of the act of April 26, 1906.

If the act of 1906 be unconstitutional, will defendants contend that it could have been superseded by a subsequent act of the same tenor—also unconstitutional?

By Finding XVI of the Court of Claims, in Case No. 331 (Rec., 28), more than 25,000 land transfers are said to have taken place in contravention of the act of April 26, 1906. If the act of 1908 supersedes that of 1906, there still remain, therefore, these 25,000 transactions, the legality of which must depend upon the act of 1906, and so long as they remain this case cannot present a moot question.

During the oral argument it was stated by the attorney claiming to represent the Cherokee Nation that within forty-eight hours after a declaration by this court that these acts of Congress complained of are invalid, no full-blood Cherokee in Oklahoma would own enough land in which to be buried, and similar statements were made by him regarding their alleged incompetency and degeneracy, which counsel for appellants, representing these full-bloods under the authority of an act of Congress, challenge and deny. Not one of the statements made by the attorney is supported by the record. On the contrary, the record shows that it will be impossible for any full-blood Cherokee to alienate his homestead until twenty-one years from the date of the receipt of his certificate of allotment. So the fearful state of poverty predicated cannot be reached sooner than 1923.

Counsel submit that no such issue as this ought to have found its way into the case; but if the question be one of any interest whatever, we refer to the report of the Senate Committee on the subject, appearing on pages 58 and 59 of our original brief, wherein they report the legislation complained of to be "unwise, *injurious* to the Indian, and of no validity."

It might not be inappropriate in this connection to refer to the fact that this is not the first time the representatives of the so-called Cherokee Nation has appeared in this court to oppose, as in the case at bar, the contentions of the Cherokees by blood as to the disposition of their property, as will appear from the record in the Eastern Cherokee case in which the contentions of the Cherokees by blood were sustained over those of the representatives of the so-called Cherokee Nation.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Appellants.

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THE UNITED STATES.

STIPULATION.

In accordance with a stipulation made between the attorneys of record in the Court of Claims, it is hereby stipulated in this cause, as follows:

> "The petitioners are enrolled as members of the Cherokee tribe, residents of that part of the State of Oklahoma, formerly Indian Territory, and are the identical persons named in the act of Congress of March 1, 1907 (34 Stat. L., 1028), conferring jurisdiction upon this court to hear and determine this

suit. They have received allotments of both homestead and surplus lands under the provisions of the allotment act of July 1, 1902 (32 Stat. L., 716).

WILLIAM H. ROBESON,
For Appellants.
WADE H. ELLIS,
For the United States.

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THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHEROKEE NATION.

Statement of the Case.

This case was instituted under the following provision contained in the Indian appropriation act (34 Stat., 1015-1028) approved March 1, 1907:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July first, nineteen hundred and two, an act entitled "An act to provide for the allot-

ment of lands to the Cherokee Nation, for the disposition of townsites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July first, nineteen hundred and two, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, as provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts and by the Attorney General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of said acts authorized to be brought into question in either or both of said cases the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for

> services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

and is for the purpose of testing the constitutionality of section 2 of the act of Congress approved April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), authorizing the enrollment of minor children born to recognized and enrolled citizens of the Cherokee Nation, and granting to them an equal share in the allotment of Cherokee lands and in the distribution of Cherokee tribal moneys.

Section 2 of said act of April 26, 1906, is as follows:

> SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection

> of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contests shall be instituted against such allotment: *Provided,* That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

The amendatory provision of the act of June 21, 1906, referred to is as follows:

> That section two of the act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words *"Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

The act of July 1, 1902, provided that the Cherokee roll should be made up of those living on September 1, 1902, and

that no persons born thereafter should participate in the allotment of Cherokee tribal lands or the distribution of Cherokee tribal funds. The act of April 26, 1906, as amended by the act of June 21, 1906, admitted children born of enrolled Cherokee parents between September 1, 1902, and March 4, 1906, to participate in the allotment and distribution of tribal lands and funds.

On May 11, 1900, the Commission to the Five Civilized Tribes began the making of a roll of the citizens of the Cherokee Nation under the allotment act of June 28, 1898 (30 Stat., 495), and was still engaged in the making of this roll when the citizenship act of March 3, 1901 (31 Stat., 1073), the allotment act of July 1, 1902, *supra,* and the amendatory acts of April 26, 1906, *supra,* and June 21, 1906, *supra,* were passed. Under the act of March 3, 1901, *supra,* the Secretary of the Interior fixed the closing of the roll as of July 1, 1902. The date of the closing of the roll was afterwards extended by the act of July 1, 1902, *supra,* to September 1, 1902, and by the act of April 26, 1906, *supra,* was further extended to March 4, 1906, at which time it was finally completed (Rec., p. 20).

On September 28, 1905, the Cherokee National Council, in pursuance of the provisions of the Cherokee constitution, passed an act approved November 7, 1905, by the President of the United States, which provided, among other things, for the appointment by the Principal Chief of a commission consisting of three persons to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs (excepting all matters pending in the United States courts), of which the Principal Chief was made *ex-officio* a member. The commission was appointed in accordance with the above act (Rec., p. 23).

On September 29, 1905, the commission was instructed by a joint resolution of the National Council of the Cherokee Nation that it was the sense of the Cherokee people that

> "all children born since September first, nineteen hundred and two, and prior to March fourth, nine-

> teen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this cannot be done, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act" (Rec., p. 24).

In consequence of the efforts of the Cherokee commission appointed and instructed as aforesaid, the provision for the enrollment of minor children living on March 4, 1906, born of enrolled Cherokee citizens, was incorporated in the act of April 26, 1906, *supra,* and amended by the act of June 21, 1906, *supra,* so as to remove any doubt that it applied to the Cherokee Nation (Rec., p. 24).

After the allotment to all of those entitled under the provisions of the act of July 1, 1902, *supra,* there remains sufficient lands and funds to provide for the allotment of all of the minor Cherokee children entitled to enrollment under the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra* (Rec., pp. 21 and 22).

Section 63 of the act of July 1, 1902, *supra,* provided that:

> "The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred six."

But by a joint resolution of Congress approved March 2, 1906 (32 Stat., p. 822), it was further extended as follows:

> The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and ef-*

> *fect for all purposes* under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

And section 28 of the act of April 26, 1906, *supra,* contained the following provision further continuing the Cherokee tribal government:

> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year."

And no other act has subsequently been passed discontinuing the Cherokee tribal government.

It is conceded that there are enough unallotted tribal lands and undistributed tribal funds to provide allotments for enrolled members of the Cherokee Nation, including those enrolled under section 2 of the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra.*

The allotments made to individual citizens prior to the passage of the act of April 26, 1906, *supra,* will not in any way be disturbed or affected (Finding XV, Rec., p. 25).

The Court of Claims in its opinion found as conclusions of law as follows:

> 1. The petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States on July 1, 1902, the date of the passage of the act of that date, as were their children thereafter born as set forth in Finding V.
>
> 2. The Cherokee Nation is and always has been recognized by the United States as a distinct political

community, subject only to the paramount authority of the United States.

3. The tribal existence and present tribal government of said Cherokee Nation were existing at the date of the passage of the acts April 26 and June 21, 1906, as set forth in Finding XV.

4. No citizen of the Cherokee Nation has any vested interest in the unallotted lands of said nation or in the undistributed funds in the Treasury of the United States to the credit of said nation or tribe.

5. Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the national council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

6. The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

7. The provisions of the act April 26, as amended by said act of June 21, 1906, authorizing the enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is a valid constitutional statute, and the minor children so enrolled, as therein provided and set forth in the findings herein, are entitled to remain upon the final Cherokee roll for the purpose of participating in the allotment of the Cherokee lands and in the distribution of the Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 *ibid.*, 221), and July 1, 1902 (32 *ibid.*, 716).

8. The petition is therefore dismissed and judgment ordered for the defendants (Rec., pp. 25-26).

BRIEF AND ARGUMENT.

Status of the Cherokee Nation.

The second conclusion of law in the opinion of the court hereinabove quoted defines the status of the Cherokee Nation.

The Cherokee Nation has been recognized as a body politic, a domestic dependent nation, subject only to the paramount authority of the Government of the United States, for more than a century, and its status has been the subject of so many judicial decisions by the courts, including decisions of the Court of Claims and of this court, wherein its history as a nation has been repeatedly so exhaustively reviewed and its relation to the Government of the United States so clearly defined, that reference to them is all that is deemed necessary.

A treaty was made with the Cherokees by the United States as early as 1785 (7 Stat., 18), and from time to time thereafter numerous treaties were entered into with the Cherokees recognizing them as a nation, the last being dated July 19, 1866 (14 Stat., 799). Congress by an act approved March 3, 1871, section 2079, Revised Statutes, determined to change the policy of the United States in dealing with Indian nations or tribes, and instead of negotiating treaties with them to govern them directly by acts of Congress. Under the treaty of 1835 (7 Stat., 478) and treaties made prior thereto the Cherokees removed west of the Mississippi River, became reunited by an act of union of date July 12, 1838, received a patent to their lands, of which the present lands are a part, from the President of the United States, dated December 31, 1838, and adopted a written constitution September 6, 1839. In accordance with this constitution the Cherokee government was recognized, consisting of three departments, the legislative, the executive, and the

judicial, and a code of written laws was adopted, which laws were enlarged upon, amended, or repealed, in whole or in part, from time to time. (Cherokee Trust Funds, 117 U. S., 288; *Cherokee Nation vs. Southern Kansas Railway Co.*, 135 U. S., 641; *Cherokee Nation vs. Journeycake*, 155 U. S., 196; *Delaware Indians vs. Cherokee Nation*, 193 U. S., 127; Compiled Laws of the Cherokee Nation, 1892; Intermarried White cases, 40 C. Cls., 411.)

These decisions abundantly sustain conclusion two of the Court of Claims.

Cherokee tribal government still in existence and recognized as such.

The Cherokee Nation is still recognized as a political community by the political department of the United States.

The courts have uniformly held that as long as a nation of Indians was recognized in the tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan*, 175 U. S., 1, and cases cited.)

Section 63 of the act of July 1, 1902, looked to a complete administration upon the entire Cherokee estate prior to March 4, 1906, and provided "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906," but at that time it was found that the enrollment work had not been completed and a large part of the Cherokee lands were still unalloted, and Congress by joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> "The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and effect for all purposes* under existing laws until all

> property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Section 28 of the act of April 26, 1906 (34 Stat., 137), continued the tribal government of the Cherokee Nation "until otherwise provided by law," and no act of Congress has subsequently been passed discontinuing the Cherokee tribal government.

The record in this case shows that the act of the Cherokee council under which the Cherokee commission was appointed was approved by the Principal Chief and by the President of the United States November 7, 1905 (Rec., p. 23), and also the joint resolution instructing said commission on August 17, 1907 (Rec., p. 24), *and the approval of said acts by the President was a recognition of the Cherokee Nation by the political department of the United States.*

As late as January 27, 1908, the debates of the Senate of the United States show that the Senate refused to insert the word "late" as an amendment before the words "Five Civilized Tribes" in the Indian appropriation bill then pending which is an expression of the sense of the Senate that the tribes were not regarded as dissolved.

But the Court of Claims also recognized the Cherokee Nation as a political community when on October 7, 1904, it permitted it to intervene in the Intermarried White cases (40 C. Cls., 411), and this court recognized it when it rendered its decision on appeal November 5, 1906 (203 U. S., 76). See Delaware Case 193 US 127

The Court of Claims, after quoting section 63 of the act of July 1, 1902, *supra,* the joint resolution of Congress approved March 2, 1906, *supra,* and from section 28 of the act of April 26, 1906, continuing the tribal existence and present tribal government of the Cherokee Nation, said:

> "Therefore, in considering the questions involved, we shall assume the validity of those provisions con-

> tinuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

In the case of Brown and Gritts vs. The United States, commenting upon the continuance of the Cherokee tribal government, the Court of Claims on February 8, 1909 (44 C. Cls., 283), used the following language:

> "As the United States is the self-constituted guardian of the Indians with plenary authority over their tribal relations, it is for Congress and Congress alone to determine when that relation shall cease."

In other words, when Congress, by their legislation, have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts cannot enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purpose of Congress.

And the court in the same opinion also said:

> "Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn."

In the case of Kansas Indians, *supra*, upon the question of the diminished power of the tribal government this court held:

> "Because some of those customs have been abandoned, owing to the proximity of their white neighbors may be a witness of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved."

And further on in the same opinion this court said:

> "But the action of the political department of the Government settles beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head man negotiated a treaty with the United States, which, for some reason not explained in the record, was either not sent to the Senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the General Government has a superintending care over their interests and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this *status* when she accepted the act admitting her into the Union."

We call the attention of the court to several provisions of the acts of July 1, 1902, *supra*, and April 26, 1906, *supra*, as showing the attitude of Congress towards the continuation of the tribal relations. We do this in view of the persistent, and to us unreasonable, contention of the appellants that the Cherokee tribal existence and government are limited to the allotment of public lands and a distribution of public funds. For instance, section 29 of the act of July 1, 1902, *supra*, under which all allotments have been and are still being made, provides that

> "the roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, *one with the Principal Chief of the Cherokee Nation,* and one to remain with the Commission to the Five Civilized Tribes."

Section 32 provides for the continuation of the Cherokee tribal schools, "under the supervision of a supervisor ap-

pointed by the Secretary and a school board *elected by the National Council.*"

Section 33 provides that all teachers shall be examined by said supervisor and school board, and section 34 provides that "*all moneys for carrying on the schools shall be appropriated by the Cherokee National Council.*"

Section 37 provides that damages for public highways or roads, other than on section lines, shall be paid out of the tribal funds, "*while the tribal government continues, and to be paid by the Cherokee Nation during that time.*"

Section 58 provides the manner in which patents to allotments shall be executed; that all of the right, title, and "interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in his allotment certificate" shall be conveyed by the Principal Chief of the Cherokee Nation to the allottees.

Section 67 of the act provides for the payment of the indebtedness of the tribe existing at the date of the ratification of the act, and how the warrants shall be drawn therefor "*hereafter and prior to the dissolution of the tribal government.*"

Section 68 provides for the institution of suits in the Court of Claims *for the collection of claims of the Cherokee Nation, and for the appointment of attorneys by the tribe, acting through its Principal Chief.*

Section 6 of the act of April 26, 1906, *supra*, provides—

> "That if the Principal Chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, *the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability, or death*

of the incumbent, by appointment of a citizen by blood of the tribe."

Section 11 provides for the collection of the tribal revenues before and after the dissolution of the tribal government, and the settlement of the accounts of all tribal officers after the dissolution of the government.

See also, as to the duties and responsibilities of the existing Cherokee government, sections 18, 27, and 28 of the act of April 26, 1906.

The Cherokee Nation, by its recognized and duly appointed attorney, was allowed to file an intervening petition in this case and participate in the argument (Rec., pp. 12 to 18, inclusive).

The Cherokee government was certainly as much of a government and had as much power on April 26, 1906, the date of the second extension by Congress for closing the Cherokee roll, as it had on July 1, 1902, the date of the first extension of the closing of said roll, to September 1, 1902, and was as much of a government with as much power as it had on January 15, 1902, the date when the Secretary of the Interior issued the first order under the act of March 3, 1901, closing the roll on July 1, 1902. They were citizens of the United States upon all of said dates.

The reports of the Commission to the Five Civilized Tribes, and the evidence and stipulations in this case all show that there are yet lands unallotted and tribal funds undistributed. Patents must be issued for those lands signed by the Principal Chief as provided in section 68 of the act of July 1, 1902, *supra*. It results that there can be nothing in the contention of petitioners that the tribal government was abolished when the act of July 1, 1902, was ratified and promulgated on August 12, 1902.

It is urged that the Cherokees are citizens of the State of Oklahoma as well as of the United States. The case of *United States vs. Rickert* (188 U. S., 432), from which we

have quoted, disposes of that contention, but attention is invited to the historical fact that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the provision of the act providing for the enrollment of minor children which this suit seeks to have declared unconstitutional was approved April 26, 1906, and the act of reference under which this action was brought was approved March 1, 1907, and this suit was instituted on the 16th day of March, 1907.

The enabling act admitting Oklahoma to statehood in section 3 provided:

> That nothing contained in the said constitution shall be considered to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise,* which it would have been competent to make if this act had never been passed.

which clearly shows that Congress had not up to that time, nor was it the purpose of Congress by that act, to emancipate the Five Civilized Tribes from the control of Congress.

Every provision of the several acts which counsel for appellants say dissolved the Cherokee tribal government was passed prior to July 1, 1902, except section 28 of the act of April 26, 1902, *supra*, making applicable to the other Five Civilized Tribes the act of March 3, 1901 (31 Stat., pp. 1058, 1077), requiring the approval of the President to the acts of the tribal councils.

It would seem, therefore, that the third conclusion of law found by the Court of Claims:

> "The tribal existence and present tribal government of the said Cherokee Nation were existing at

> the date of the passage of the acts of April 26 and June 21, 1906,"

as set forth in Finding XV, page 25, is abundantly sustained.

No individual citizen of the Cherokee Nation has any vested interest in the unallotted lands or the undistributed funds of the tribe.

The title to the unallotted lands is in the Cherokee Nation and not in the individual citizens. The patent issued by the President of the United States on December 31, 1838, conveyed the land to the "Cherokee Nation" (Rec., p. 28).

Section 2 of article 1 of the Cherokee constitution provides:

> The lands of the Cherokee Nation shall remain common property (Rec., p. 28).

This provision of the Cherokee constitution was amended on November 26, 1866, to read as follows:

> The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation (Rec., p. 28).

The national council of the Cherokee Nation by the act of September 28, 1905, creating the Cherokee commission (Rec., p. 23), and by joint resolution No. 1 (Rec., p. 24), instructing said commission, requested the allotment of the Cherokee lands and the distribution of the moneys among all citizens entitled thereto born prior to March 4, 1906.

It was held in the Cherokee Trust Funds case (117 U. S., 288) that whatever title the Cherokees have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all members.

In the case of *Cherokee Nation vs. Journeycake* (155 U. S., 196), the court held:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them.

In the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided December 1, 1902, since the enactment of the act of July 1, 1902, providing for the allotment of the Cherokee lands, the court again reviews the treaties made with the Cherokees, discusses the title to their lands, and reaffirms and quotes from its former decisions holding that the title is in the nation and not in the individual citizens (*Delaware Indians vs. Cherokee Nation*, 193 U. S., 127).

The allotment act of July 1, 1902 (32 Stat., 716), does not change or individualize the title to the unallotted lands. Section 60 of that act provides:

> Any allottee accepting such patent shall be deemed to consent to the allotment and conveyance of all lands of the tribe as provided in this act and *to relinquish all his right, title, and interest to the same except in the proceeds of lands reserved from allotment.*

The "lands reserved from allotment" mentioned in said section are described in detail in section 24 of the same act and do not extend to unallotted tribal lands. Section 11 of the act of July 1, 1902 (32 Stat., 716), provided for the

allotment to each enrolled citizen "land equal in value to 110 acres of the average allottable land of the Cherokee Nation" only, and section 21 of said act made the allotment certificate "conclusive evidence of the right of the allottee to the tract of land described therein." No attempt was made in the act to individualize the unallotted lands, but the title was continued in the tribe.

All of these authorities are reviewed by the Court of Claims in its opinion in this case, and the court held that the title to the unallotted lands was in the tribe (Rec., p. 28).

Individual citizens have no vested rights in unallotted lands or tribal funds. This contention was pressed in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445), where certain applicants in the Cherokee Nation had been finally denied citizenship, and in the other nations admitted to citizenship under the act of June 10, 1896, by the United States court upon appeal. Congress having provided by an act approved July 1, 1898, for an appeal to the Supreme Court, the case was appealed, and upon this point the court said:

> "The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship, is placed by the judgment of a lower court beyond the power of reorganization by a higher court, though subsequently authorized by general law to exercise jurisdiction."

And it was further held in the same opinion:

> "The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested

as to preclude inquiry into his status involved a contradiction in terms."

In the case of *Wallace vs. Adams* (143 Fed. Rep., 716) the defendant was admitted to citizenship in the Choctaw Nation by the United States court under the act of June 10, 1896, and by the Supreme Court upon appeal. The Atoka agreement providing for the allotment of lands of the Choctaw and Chickasaw nations, entered into April 23, 1897, was ratified by Congress June 28, 1898 (30 Stat., 495). Practically the only contention of the defendant was that he had been finally enrolled as a citizen of the Choctaw Nation; that he had taken possession of and improved a farm upon the public domain, *and that his right to the land became vested when the allotment agreement was ratified by Congress June 28, 1898.* An exhaustive opinion was rendered by the court in this case, and upon the question of *vested rights* the court held:

> "But *none of the authorities* cited contains a decision that one has a *vested right* in the judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property."

The Supreme Court upon appeal in this case (204 U. S., 415) sustained the decision of the Circuit Court of Appeals and quoted at length with approval its former decision in the Stephens case, *supra* (*Roff vs. Burney*, 168 U. S., 218).

The Court of Claims in its opinion said:

> "We must assume that Congress had some purpose in keeping alive the tribal government until March

4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these acts the Government asserted its continued guardianship until the final distribution of the common property; and under the authorities cited we think it cannot be successfully controverted that if before any allotments had been made under the act of 1902, Congress by amendment had inserted the date March 4, 1906, in lieu of September 1, 1902, allotments as of the latter date would have been valid and effective to bind all, as under the authorities cited, no rights could vest in severalty in communal property by the mere force of a statute. If they could, then, under the act of March 3, 1901, *supra*, they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated the case here proceeds upon the theory of the validity of the extension to September 1, 1902.

"Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the property therein actually conveyed to the allottees pursuant to law."

The Court of Claims further on in its opinion exhaustively reviews all of the provisions of the act of July 1, 1902, *supra*, calling attention to the fact that by section 11 of said act the Commission to the Five Civilized Tribes was limited in the allotment of lands to citizens:

> By section 11 of said act the Commission to the Five Civilized Tribes was not only limited in the allotments to "land equal in value to one hundred

> and ten acres of the average allottable lands of the Cherokee Nation," but section 18 of the act makes it unlawful, after ninety days from the date of ratification, "for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation;" and for any violation thereof he "shall be deemed guilty of a misdemeanor," punishable by fine of not less than $100 and "shall forfeit possession of any property in question."

Attention is also invited by the Court of Claims to the provision of section 72 of said act where it is made the duty of the Secretary of the Interior to collect a grazing tax upon cattle grazed "on lands not selected in allotment by citizens" for the benefit of the tribe. Thereupon the Court of Claims says:

> The act being silent as to the disposition of the unallotted lands, as the claimants concede, further legislation was necessary therefor—and this, also, the claimants concede; but they in effect say that Congress by the act of July 1, 1902, limited their power to allot such lands to any but the allottees under said act.
>
> The omission in the act to provide for unallotted lands was supplied by section 16 of the act of April 26, 1906, which, in substance, provides for the sale of any unallotted lands and the payment of the proceeds thereof into the Treasury of the United States to the credit of the tribe.
>
> Certainly Congress did not intend that rights should become vested in lands for the allotment or other disposition of which no provision was made in the act. Nor do we believe the language of the act

of 1902 is susceptible of such construction. It may be inferred that Congress, by section 5 of the act of April 26, 1906, as amended, providing that patents or deeds to allottees should be recorded "and when so recorded shall convey legal title," thereby intended that allottees should acquire legal title only after the patents or deeds to them, respectively, had been recorded.

Our contention is that the members of the tribe acquired only a vested right to the lands actually allotted to them, and that the title to the unallotted lands still remained in the tribe. (Conley *vs.* Ballinger, 216 U. S., 84, 90).

Hayes vs Banning 168 Fed Rep 221.

Nor did any title vest in the individual members of the tribe in the lands and funds under the act of July 1, 1902.

The appellants in the court below took the position that the Cherokee Nation had acquired a fee-simple title to its lands under the patent of December 31, 1838; that the tribe was dissolved by the act of July 1, 1902, and vested in the members of the tribe enrolled as of September 1, 1902, title to the tribal lands and funds, although unallotted or undistributed, which could not be disturbed by subsequent legislation. This position of the appellants utterly ignores the fact that on June 28, 1898, an allotment act was passed, under which a roll was begun on May 11, 1900, which, under the subsequent act of March 3, 1901 (31 Stat., p. 1073), authorized the Secretary of the Interior to fix the time for the closing of the Cherokee roll, which he did, and said roll was to be made as of date July 1, 1902. (Finding VI; Rec., p. 20). The making of this roll was continued under the amendatory act of July 1, 1902, *supra,* and was not completed until March 4, 1907, nearly a year after the acts of

April 26, 1906, and June 21, 1906, were passed. (Rec. p. 20.)

The act of July 1, 1902, was entitled to no greater weight than the acts of June 28, 1898, and March 3, 1901. As was said by this court in the Cherokee Intermarried White Cases (203 U. S., 76): "Counsel for claimants speak of the act of 1902 as a 'treaty,' but it is only an act of Congress, and can have no greater effect." Further the court said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

Therefore, if the contention of the appellants is correct, they acquired vested rights under the act of June 28, 1898, which were afterwards divested by the act of July 1, 1902; and if the rights of individual members could have been properly interfered with by the act of 1902, it is difficult to understand why they could not be still further interfered with by the acts of April 26, 1906, and June 21, 1906. To make ourselves perfectly clear, the act of March 3, 1901 (31 Stat., 1073), gave the Secretary of the Interior authority to fix the closing of the tribal roll begun under the act of 1898, and he fixed the date as of July 1, 1902. Afterwards, by the act of July 1, 1902, *supra,* Congress itself fixed the date of the closing of the roll as September 1, 1902, and provided that none born after that date should participate in the distribution of the tribal lands and funds, thereby permitting the enrollment of children born between July 1, 1902, and September 1, 1902. If this could be legally done it is difficult to see why those born between September 1, 1902, and March 4, 1906, were not legally admitted to enrollment by the acts of April 26, 1906, and June 21, 1906. This was a remedial provision, for it is conceded that if the act of July 1, 1902, had not fixed the closing of the roll as of September 1, 1902, all of the children to whose enrollment the appellants have objected in this case, and even those born after March 4, 1906, would

have participated in the distribution of the Cherokee communal property at the final settlement. Not only this, but the closing of the roll on September 1, 1902, would have deprived the families of those Cherokees who were entitled to be enrolled on September 1, 1902, but who had died between that date and the ratification of the act on August 7, 1902.

As a matter of law, however, the title to the tribal lands was not changed in any respect by the act of July 1, 1902, as clearly shown by sections 58 and 59 of that act, which provided that the signature of the Principal Chief to the patent shall convey the interest of the nation, and the approval of the Secretary of the Interior shall serve as a relinquishment of the interest of the United States in the allotted lands.

The attorneys for the appellants have in effect contended, as it appears to us with more earnestness than reason, that the interest of the individual members of the nation in the tribal lands was that of tenants in common. This position has been rendered untenable by the decision in the case of *Fleming et al. vs. McCurtain et al., supra,* where it was held to be a communal interest.

The Court of Claims in its opinion said:

> "While it was within the power of Congress, by the act of July 1, 1902, to fix the date for enrollment prior to the time therein fixed for the termination of the tribal government, no sufficient reason, other than the act itself, can be urged therefor on either legal or equitable grounds, and this was doubtless the view of Congress when, by the acts of April and June, 1906, the time of enrollment was extended to the date fixed for the termination of the tribal government. This act is in harmony with the act of June 28, 1898 (30 Stat. L., 495, 513), respecting the Choctaw and Chickasaw nations, wherein it is provided that: 'It is further agreed that the Choctaws

and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.'

"True, the acts of April and June, 1906, were passed after the date fixed for the termination of the tribal government, but their operation respecting those to be enrolled was limited to March 4, 1906. Hence but for these acts children of enrolled Cherokee parents under the act of July 1, 1902, though living during the existence of the tribal government, would have been denied their rights as communal owners in the common property; and it is no answer to say that the communal rights of the members of the nation in the lands were severed by the act of July 1, 1902, and thereby became vested as of the date of enrollment thereunder, for the tribal government was to continue until March 4, 1906, of which the allottees were bound to take notice; and so long as the tribal government existed no right as between themselves or as against the United States could vest in severalty in the common or unallotted property. In other words, nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States. The act does not seek to divert the lands from the communal owners and give them to strangers, but merely extends the time for allotment so as to include and equalize allotments to all those living on the date fixed for the termination of the tribal government" (Rec., pp. 29 and 30).

Cherokee tribal lands and funds sufficient for all allotments.

There have been 5,610 children, born between September 1, 1902, and March 4, 1906, enrolled under the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*. There are also 3,800 allotments of tribal lands still remaining unallotted and over two millions of dollars of tribal funds in the Treasury of the United States, sufficient lands and funds for the allotment of all of these children without interfering with the allotments made under the act of July 1, 1902, to persons who were living on September 1, 1902.

All of these after-born children who cannot receive allotments of land are entitled to receive twice $325.60 or $651.20 (Finding 8, Rec., p. 21, and section 2 of the act of April 26, 1906, 34 Stat., 137).

It cannot, therefore, be successfully claimed that any lands which have already been allotted will be interfered with if these children are adjudged to be entitled to remain upon the rolls, and especially so in view of section 60, act of July 1, 1902, *supra*, where every allottee who received a patent assented to the allotment and conveyance of the tribal lands, as provided by the act, and relinquished his right, title and interest to the same, except the proceeds of certain lands reserved from allotment. The lands reserved from allotment were such as were reserved for schools and other public purposes by section 24 of the same act.

The Court of Claims in its opinion (Rec., p. 27) said:

> "After said allotments had been made there remained unallotted lands sufficient for about 3,800 such average allotments, which unallotted lands, together with the undistributed funds in the United States Treasury, to the credit of the Cherokee Nation—exceeding $2,000,000—are ample, as provided by the act of April 26, 1906, as amended to equalize

the allotments of all persons on the final or extended roll of Cherokee citizens as of March 4, 1906."

It will be seen, therefore, that our contention in this respect is conceded by appellants and upheld by the court, and that no lands actually allotted to any individual were affected by the acts of Congress complained of in this action.

The provision of the acts of April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 341, 342), for the enrollment of children born after September 1, 1902, was an agreement with the Cherokee Nation.

The provision incorporated into the act of April 26, 1906, as amended by the act of June 21, 1906, for the enrollment of minor children was really an agreement with the tribes through their accredited representatives. The Cherokee Commission was appointed by authority of an act of the Cherokee Council; was accompanied by the Principal Chief, W. C. Rogers, and was instructed by joint resolution to request the enrollment of minor children born on or prior to March 4, 1906, and living upon that date, and this commission followed these instructions and requested the enrollment of said minor children (Rec., p. 24). While the act of April 26, 1906, in so far as it provides for the enrollment of minor children, may have no greater effect than an act of Congress, it was really an agreement, and this act should be interpreted in the light of all the circumstances attending its enactment.

Not only was it the sense of the Cherokee National Council that the children born between September 1, 1902, and March 4, 1906, should be enrolled, but the Cherokee Nation through its authorized representatives requested both Congress and the Department of the Interior to insert the provision in question, and it was done at their request (Rec., p. 24).

In the case of *Wiggan vs. Conolly* (163 U. S., 56) the court sustained a second agreement extending the restrictive period upon the alienation of lands allotted and patented to minors, holding:

> "The land and the allottee were both still under the charge and care of the nation and the tribe, and *they could agree for still further protection, a protection which no individual was at liberty to challenge.*"

In this case the tribe and the Government have agreed to an extension of the time within which these children born since September 1, 1902, may be enrolled before the dissolution of the tribal government, and we earnestly contend, in the language of this court, that "no individual was at liberty to challenge" this agreement as incorporated in the act of April 26, 1906, *supra*. Much less have the claimants in this case the right to complain, as *their* only right to bring these suits is contained in the jurisdictional act which gave to them no greater rights than they already possessed.

The court in the case of *Stewart vs. The United States and the Osage Indians* (206 U. S., 185), said:

> "The passage of the act did not imply an admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.*"

The Court of Claims in its opinion held:

> As set forth in Findings XI, XII, and XIII, said acts of April and June, 1906, were passed by Congress at the request and on the petition therefor of the representatives of the Cherokee Nation appointed therefor with the approval of the President of the

> United States (31 Stat. L., 1077), and, therefore, so far as the nation could act in behalf of its citizens in that respect their consent, if that were necessary, was given to said acts.

Appellants in their brief contend that they do not object to the provisions of the act of April 26, 1906, *supra*, standing alone, because, as they contend, it was not intended to apply to the Cherokee tribe, and insist that their objection lies only to the amendatory act of June 21, 1906. They contend that the following proviso, added to said section 2 of the act of April 26, 1906, was intended to make it inapplicable to the Cherokee tribe:

> "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

They insist that an agreement had been made with the Cherokee tribe, referring to the act of July 1, 1902, *supra*. They overlook the fact, however, that a similar provision had been incorporated into acts or agreements affecting all of the other Five Civilized Tribes. The proviso referred to in said section 2 was intended to refer to the provision added to section 1 of the act permitting the Secretary of the Interior to enroll upon the tribal rolls all persons whose applications were made prior to December 1, 1905, and was intended to refer to the applications of adults and not to minor children. This is clearly shown by investigating the legislative history of the act of April 26, 1906. Congress by the act approved March 3, 1905 (33 Stat., 1060), provided for the enrollment of the minor children in the Chickasaw, Choctaw, Creek and Seminole Nations born prior to and living on March 4, 1905. When the act of April 26, 1906, was introduced into the House of Representatives, section 2 of

the act only provided for the enrollment of the minor children of the enrolled parents of the members of the Five Civilized Tribes who were living on March 4, 1905, just as the act above referred to approved March 3, 1905 (32 Stat., 1060), had already provided for the enrollment of all minor children of the other Five Civilized Tribes, except the Cherokees. Therefore, it could not have been intended that this act as introduced into the House of Representatives was to exclude the minor children of Cherokees. This bill was introduced as H. R. 5976, and volume 40, part 2, page 1242, contains a discussion of the bill, and shows that it passed the House of Representatives with the date March 4, 1905, instead of March 4, 1906, and it was finally amended in the Senate. Mr. Curtis, on page 1242 of the above volume of the Congressional Record, said:

> "The Commissioner of Indian Affairs, the Secretary of the Interior and the Dawes Commission and the committee appointed by the Secretary of the Interior have carefully gone over the bill; in fact, prepared most of its provisions. It can be called a 'Department' bill."

See H.R. Report No 2347, 59 Cong. 1st Sess. Annual Rep. of

Certainly no one will contend that section 2 of the act of April 26, 1906, would have been prepared by the representatives of the Department of the Interior and intended to apply to the other four nations of the Five Civilized Tribes and not to the Cherokees, when Congress the year before, by the act of March 3, 1905, *supra,* had already provided for the enrollment of the minor children in those tribes.

The legislative history confirms the statement of the Court of Claims in Finding XIII (Rec., p. 24), that said section 2 of the act of April 26, 1906, *was passed at the request and upon the recommendation of the accredited representatives of the Cherokee Nation.* Fearing that there might be some ambiguity when the bill was finally engrossed and approved, the amendatory provision to free it of any doubt was incor-

porated into the Indian appropriation bill which was then pending, and was approved June 21, 1906.

The above record shows that the provision as originally drafted, while it embraced the other four nations of the Five Civilized Tribes, was intended only for the benefit of the minor Cherokee children. The amendment in the Senate changing the date from March 4, 1905, to March 4, 1906, provided for the enrollment of the minor children of the other tribes, the Seminoles excepted, as well as the Cherokee tribe up to March 4, 1906. *The minor children in all of the other Five Civilized Tribes, except in the Seminole Nation, who were living on March 4, 1906, have been enrolled and allotments made to them.*

Counsel for appellants, on page 17 of their brief, insist that the act under which the Cherokee Commission was appointed was not approved by the President of the United States, and therefore the commission was illegal. The attention of the court is invited to Finding XI (Rec., p. 23) of the Court of Claims, wherein it is found as a fact that the act of the Cherokee Council approved by the Principal Chief on September 28, 1905, under which the Cherokee Commission was appointed, was approved by the President of the United States November 7, 1905, and this commission was "appointed in conformity with section 3, article 6, of the Constitution of the Cherokee Nation," and was "authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and all other relations with the United States of America, except as to all the matters now pending in the courts of the United States."

Said section 3, article 6, of the Cherokee Constitution, provides:

> When the National Council shall determine the expediency of appointing delegates or other public agents for the purpose of transacting business with

> the Government of the United States, the Principal Chief shall recommend and, by the advice and consent of the national committee, appoint and commission such delegates or public agents accordingly.

The name of the upper branch of the Cherokee Council was changed from "national committee" to "senate" by section 1 of the amendments to article 3, Cherokee Constitution, adopted November 26, 1866, which reads as follows:

> The upper house of the National Council, known as the national committee, shall be hereafter known and styled "the senate of the Cherokee Nation."

Finding XIII (Rec., p. 24) shows that this commission, accompanied by the Principal Chief and National Attorney for the Cherokee Nation, "came on to Washington on November 21, 1905, *and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee Commission, section 2 of the act of April 26, 1906,*" was passed, the joint resolution of the Cherokee National Council, instructing the commission in detail, as set forth in Finding XII (Rec., p. 24).

These findings of the Court of Claims conclusively show that the Cherokee Commission was legally appointed and had the authority to represent the Cherokee tribe. The Court of Claims was fully justified in its fifth conclusion of law that:

> Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

The power of Congress to administer upon the affairs of dependent Indian tribes is plenary.

But if the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra,* be found by the court not to have the effect of an agreement, we insist that Congress had the power to enact the legislation.

The Government changed its policy toward the Indian tribes on March 3, 1871 (16 Stat., 544). Prior to that time treaties were negotiated with them, but a provision was inserted in the act of that date, now section 2079 of the Revised Statutes, declaring the intention of Congress to thereafter abandon its former policy of negotiating treaties and to exercise authority over them by direct legislative enactments. This policy was justified and sustained by the courts upon the theory that the Indians of all tribes were wards of the Government of the United States, and while they were recognized as distinct political communities, yet they were in a condition of pupilage or dependency and subject to the paramount authority of the United States (*Cherokee Nation vs. Hitchcock,* 187 U. S., 294).

The court held in the case of *Cherokee Nation vs. Southern Kansas Railway Company* (135 U. S., 641), speaking of the Cherokees, as follows:

> From the beginning of the Government to the present they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation vs. Georgia* (5 Peters, 1, 17), "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with

> them, would be considered by all as an invasion of our territory and an act of hostility."

And the court further held in that case:

> The Cherokee Nation is not sovereign in the sense that the United States or a State is sovereign, but is now, as heretofore, a dependent political community *subject to the paramount authority of the United States.* (*Stephens vs. Cherokee Nation,* 174 U. S., 445; *Worcester vs. Georgia,* 6 Peters, 515; *Choctaw Nation vs. United States,* 119 U. S., 1; *Jones vs. Meehan,* 175 U. S., 1; *United States vs. Kagama,* 118 U. S., 375; *United States vs. Rickert,* 188 U. S., 432; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; *Roff vs. Burney,* 168 U. S., 218.)

Because of the fact that all Indian tribes or nations are regarded as dependent communities or wards of the Government, the courts are reluctant, particularly since Congress, in 1871, announced its change of policy in dealing with the Indians by direct legislation, to interfere with their control by Congress. In the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294) the court, speaking through Mr. Justice White, on December 1, 1902, said:

> The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed,

referring to the case of *Stephens vs. Cherokee Nation* (174 U. S., 445). The court closes the opinion with the following sweeping language:

> The power existing in Congress to administer upon and guard the tribal property, and the power being

> political and administrative in its nature, the manner of its exercise *is a question within the province of the legislative branch to determine, and is not one for the courts.*

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), decided by the court as late as January 5, 1903, it was held:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, *and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.* Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties and of course a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into upon its behalf. But, as with treaties made with foreign nations (Chinese Exclusion case, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians.

In the above case Congress, openly in violation of existing treaties with the Indians, by direct legislation provided in detail for the allotment of the lands of the Indians, the sale of their surplus lands, and the disposition of the proceeds derived therefrom, upon the theory that they were wards of the Government. In concluding its opinion in that case the court used the following language, indicating that there was no limit to the plenary power of Congress over Indian tribes, and that the courts would not interfere with the discretion of Congress:

> We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in

> the premises. In any event, *as Congress possesses full power in the matter, the judiciary can not question or inquire into the motives which prompted this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.* The legislation in question was constitutional and the demurrer to the bill was therefore rightly sustained. (*Stephens vs. Cherokee Nation*, 174 U. S., 445.)

The same principle has been repeatedly enunciated by the court. *In re Heff* (197 U. S., 488), the court, after discussing the relation of guardian and ward between the United States and Indian tribes and the plenary power of Congress over them, citing numerous authorities, held:

> *It is not within the power of the courts to overrule the judgment of Congress.* It is true there may be a presumption that no radical departure is intended, and courts may easily insist that the purpose of Congress be made clear by its legislation, *but when that purpose is made clear the question is at an end.*

In the case of *United States vs. Rickert* (188 U. S., 432), commenting upon the exclusive authority of Congress over Indians, the court, through Mr. Justice Harlan, said:

> It is for the legislative branch of the Government to say when these Indians shall cease to be dependent or assume the responsibility attaching to citizenship. That is a political question which the courts may not determine. (*Wallace vs. Adams*, 204 U. S., 415.)

In the case of *United States vs. Rogers* (4 How., 567), the court held:

> The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and *they hold with the assent of the United States and under their authority.* (*United States vs. Kagama,* 118 U. S., 375; *Talton vs. Mayes,* 163 U. S., 376.)

The latest decision of the Supreme Court was in the case of *Starr vs. Campbell,* decided February 24, 1908, wherein the court said:

> It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of this policy which have been sustained by this court we need not stop to comment on.

The court in the case of *Thomas vs. Gay* (169 U. S., 264) held:

> *The unlimited power of Congress* to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations may be conceded.

The Court of Claims in its opinion, after reviewing a number of authorities, held:

> But independent of such treaties and their acknowledgment, the Cherokees and other Indians have been, since our Government was organized, subject to the paramount authority of the United States, exercised by Congress; and they and the territory occupied by them being within the geographical lim-

its of the United States have at all times been subject to the laws of Congress enacted for their protection as well as for the protection of the people with whom they come in contact (*Worcester vs. Georgia,* 6 Pet., 515). In other words, the United States, had they so elected, might from the first, without the consent of the Indians, have controlled them and their tribal property by acts of Congress instead of by treaties (*United States vs. Kagama,* 118 U. S., 375, 379). And the purpose to control them by acts of Congress instead of by treaties was indicated by the act of March 3, 1871 (now Rev. Stat., sec. 2079).

Referring to that section the court, in the *Matter of Heff* (197 U. S., 488, 498), said: "From that time on the Indian tribes and the individual members thereof have been subject to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Further, in commenting on the power of Congress in that same case, the court, quoting from the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553, 565), said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

And after quoting numerous authorities in support of that holding and other authorities looking to the protection of the Indians, the court said: "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them."

Furthermore, in the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) the court held, in effect, that Congress, by the act of June 28, 1898,

> "practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." (See also *Delaware Indians vs. Cherokee Nation,* 193 U. S., 127.)
>
> To the same effect also is the case of *Wallace vs. Adams* (204 U. S., 415) respecting citizenship in the Indian tribes.

The above authorities abundantly sustain the sixth conclusion of law held by the Court of Claims:

> The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

Attention here is again invited to the fact that no provision was made in the act of July 1, 1902, *supra,* for the disposition of the unallotted lands belonging to the Cherokee Nation, but that is found in sections 16 and 17 of the act of April 26, 1906. Appellants, however, concede this conclusion of law on page 22 of their brief in the following language:

> "Having plenary power over tribal property, as numerous decisions declare, it could provide for its distribution if the Indians were at the time in tribal relations (*Lone Wolf vs. U. S.,* 187 U. S., 553, 565).

Lujan vs Colorado 164 Fed Rep 670

Character of Title Immaterial.

Nor does the difference in the character of title held by the Indian tribes to their lands in any manner or degree change, alter, or diminish the power of Congress over them

or their tribal property. This power is the same in all cases—*plenary*.

Whether the fee title to the land is in the United States, as is the case with most Indian land, and held in trust for the Indians, or whether it had been allotted, as was the case in *United States vs. Rickert* (188 U. S., 432) and the case of the Kansas Indians (5 Wall., 737), or whether the fee title had been conveyed by patent by the United States to the tribe for the common use and benefit of all, subject only to the possibility of reversion as stipulated in the patent, as in the case of the lands of the Five Civilized Tribes, the courts have made no distinction as to the paramount authority of Congress. (*Cherokee Nation vs. The Southern Kansas Railway Co.*, 135 U. S., 641; *Stephens vs. Cherokee Nation*, 174 U. S., 445; *Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Choctaw Nation vs. United States*, 119 U. S., 1.)

From an examination of these cases it will be observed that the Supreme Court, upon the question of the power of Congress over Indian tribes, cites with approval decisions in Indian cases without reference to the character of the title held by the tribe.

The appellants insist that the difference in the title held by Indian tribes conditions the power of Congress to legislate with respect to their lands.

Mr. Justice White delivered the opinion of this court in the cases of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) and *Lone Wolf vs. Hitchcock* (187 U. S., 555), and no distinction was made as to the plenary power of Congress over the Indian tribes affected because of the character of the title held by the respective tribes. The Lone Wolf case was decided after and upon the authority of the case of *Cherokee Nation vs. Hitchcock*. The same supreme authority of Congress was upheld by this court in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445).

Indians Made Citizens of the United States Immaterial.

It is not material that petitioners became citizens of the United States under the act of March 3, 1901 (31 Stat., 1447). The Government of the United States did not thereby lose control over their tribal property. The courts have uniformly held that as long as a nation of Indians was recognized in their tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan*, 175 U. S., 1, and cases cited.)

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553) the court held:

> That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw vs. United States* (119 U. S., 1, 27) and *Stephens vs. Cherokee Nation* (174 U. S., 445, 483).

The court in passing upon this very question in the case of *United States vs. Rickert* (188 U. S., 432) says:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. *These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts may not determine.*

In *Farrel vs. United States* (110 Fed. Rep., 942) it was held:

> *It is a settled rule* of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, *to follow the action of the legislative and executive departments to which the determination of these questions has been especially intrusted.* (*United States vs. Holliday*, 3 Wall., 407; *U. S. vs. Earl*, 17 Fed. Rep., 75, 78.)

The mere fact that the Indian had taken an allotment and been made a citizen of the United States did not end his status of wardship or limit or end the power of superintendence and protection of the Government of the United States. (*Hitchcock vs. Bigboy*, 22 Appeal Cases D. C., 275; *Farrell vs. United States*, 110 Fed., 942; *Beck vs. Flournoy Co.*, 65 Fed., 30; *Pilgrim vs. Beck*, 69 Fed. Rep., 895; *U. S. vs. Flournoy*, 71 Fed., 576; *U. S. vs. Mullin*, 71 Fed., 682.)

The Circuit Court in the case of *Ross vs. Eels* (56 Fed. Rep., 855) sustained the contention that members of the Puyallup tribe in the State of Washington to whom allotments had been made and who were made citizens of the United States and of the State when the State was admitted into the Union, were emancipated from the control of the Government of the United States, but upon appeal the Circuit Court of Appeals (64 Fed. Rep., 417) reversed the decision of the lower court, holding:

> The act of February 8, 1887, which confers citizenship, does not emancipate the Indians from all control or abolish the reservation.

The case was appealed to the Supreme Court but dismissed (163 U. S., 702.)

But the act of March 3, 1901 (31 Stat., 1447), conferring citizenship upon the Indians in the Indian Territory was

only an amendment to the act of February 7, 1887, by inserting in said act the words, "and every Indian in Indian Territory." There was no intention on the part of Congress to lessen or diminish the authority of the Government of the United States over the other Indian tribes by the act of March 3, 1901. And therefore, all decisions cited to the effect that that act did not emancipate the other Indian tribes from governmental supervision are pertinent.

Nor is there anything in the Heff case in conflict with the other authorities cited herein. In that case the court reviewed at length the history of Indian legislation and prior decisions of the court. Construing the Kickapoo treaty in connection with the act of 1887 granting citizenship to Indian allottees, the court held that Congress had the power and by the language did relinquish guardianship over the Indians, and that they were subject to the police regulations of the State. But the court was careful to point out that their being made citizens of the United States and of the State in no way interfered with the control over and protection by Congress of their property rights. And it further held:

> In *construing a statute* affecting the relationship of the Government and the Indians, *it is not within the power of the courts to overrule the judgment of Congress.*

In the case of *McKay vs. Kalyton* (204 U. S., 458) the court, on February 25, 1907, reaffirmed the Rickert case and distinguished between that case and the Heff case.

A review of this entire question by the court is found in the case of *Dick vs. United States,* decided by the Supreme Court of the United States February 24, 1908 (208 U. S., 340-359).

The last expression of this court is in the case of *United States vs. Celestine* (215 U. S., 276), where the court reviews many of its previous decisions, and discussed at length the Heff case, holding that conferring of citizenship upon

the members of an Indian tribe did not emancipate them from the control of the Government of the United States, unless the act conferring citizenship so stated in explicit terms.

There could have been no intention to emancipate the Indians of the Five Civilized Tribes from the control of Congress by the act of March 3, 1901, for their citizenship rolls were not completed, none of their lands had been allotted, they were not then within the boundary of any State, and therefore were not subject to the jurisdiction of any State court, but, except for the authority reserved to their tribal councils and officers, were controlled exclusively by acts of Congress and the Department of the Interior, and were under the jurisdiction of the courts of the United States, provided for by Congress for that country.

However, the court in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), on December 1, 1902, decided that the act of March 3, 1901, granting citizenship to the Indians in the Indian Territory *did not emancipate* them from the control of the Government of the United States, in the following language:

> There is no question in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, *even though the members of the tribe have been invested with the status of citizenship under recent legislation.*

If the contention of counsel for appellants to the effect that the act of March 3, 1901 (31 Stat., 1073) conferring citizenship upon the Indians completely emancipated them and their property from the guardianship and control of Congress, then every act of Congress, including the acts of July 1, 1902, *supra*, April 26, 1906, June 21, 1906, and the juris-

dictional act under which this suit is brought and the subsequent completion of the rolls and the allotment of the lands are invalid. The act of March 3, 1901, *supra,* was as much in force when the act of July 1, 1902, *supra,* was passed as when the acts of April 26, 1906, as amended by the act of June 21 1906, *supra.*

This court, in the Stephens case (174 U. S., 415), held in effect that Congress by the act of June 28, 1898, had practically assumed full control over the Indian tribes and their property. That decision was rendered May 15, 1899, prior to the passage of the act of March 3, 1901, *supra.* Since the passage of that act this court, in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided December 1, 1902, reaffirmed that decision.

History of Enrollment Legislation and the Closing of the Rolls.

Congress by an amendment to the Indian appropriation act approved March 3, 1893 (27 Stat., 612, 645), provided for the appointment of three commissioners to negotiate agreements with the Five Civilized Tribes for the purpose of extinguishing the tribal title to their lands either by cession to the United States in whole or in part or by allotment among the citizens of the respective tribes entitled thereto. This commission was officially designated "The Commission of the Five Civilized Tribes," but was commonly known as the "Dawes Commission" because its first chairman was ex-Senator Henry L. Dawes, long a member of the Indian Senate Committee and closely identified with Indian legislation. Two additional members were added to this commission by act of March 2, 1895 (28 Stat., 939). Complaint having been made that the respective nations and their tribal courts or citizenship commissions were prejudiced against disputed applicants for citizenship, by an amendment to the Indian appropriation act approved June

10, 1896, in addition to the authority theretofore conferred upon it by law, the Commission was authorized to hear and determine "the applications of all persons who may apply to them for citizenship in any of said nations," and the right of appeal was provided for from the decision of the commission to the United States court either on behalf of the tribe in which citizenship was sought or by the applicant.

By act of July 1, 1898 (30 Stat., 591), an appeal was provided for direct to the Supreme Court of the United States.

All applications for admission to citizenship having been presented and decided or pending upon appeal and the commission having failed thus far of its primary purpose to negotiate agreements with the respective nations looking to a dissolution of their tribal governments and allotment of their lands, Congress by section 21 of an act approved June 28, 1898 (30 Stat., 495), directed the commission to prepare a complete roll which should include all of the recognized or admitted citizens of the respective tribes and their descendants, instructing said commission in detail with great particularity how said roll should be prepared, because, as stated in said section, "the rolls so made when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The commission was further instructed by an act approved May 31, 1900 (31 Stat., 221), "not to receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such."

By the act of March 3, 1901 (31 Stat., 1073), Congress authorized the Secretary of the Interior to fix a date for the

closing of the roll, as it had the power to do under the plenary authority exercised by Congress over Indian tribes (*Cherokee Nation vs. Hitchcock,* 187 U. S., 294; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; Stephens case, 174 U. S., 445).

The Secretary of the Interior, acting under the authority of the above act, fixed the date for the closing of the Cherokee roll on July 1, 1902, and the roll was actually closed upon that date, and remained closed until after the ratification of the act of July 1, 1902, by the Cherokee people on August 7, 1902, which was promulgated August 12, 1902 (Rec., p. 20). The report of the Commission to the Five Civilized Tribes for the year ending June 30, 1902, contains the following:

> "Much difficulty having been experienced by the commission in effecting agreements with the several tribes which should enable the citizenship rolls to be closed, Congress, in the Indian appropriation bill of March 3, 1901 (31 Stat., 1073), embodied legislation calculated to overcome this obstacle. The provision referred to is as follows:
>
> "* * * 'The Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said roll, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no names shall be added thereto.'
>
> "It will be remembered that up to that date all efforts to consummate an agreement with the Cherokees had failed, and while agreements had been made with the other four tribes, that with the Choctaws and Chickasaws did not cover this important feature.
>
> "In November, 1901, under instructions from the department, the commission renewed its effort to

> negotiate an agreement with the Cherokees fixing the date for closing their rolls. Being unsuccessful at that time, a further effort was made in December, 1901, also without result. Thereupon the Secretary, acting under the provision of law above quoted, on January 15, 1902, *directed the commission to receive no applications for enrollment as Cherokee citizens after July 1, 1902.*" (Italics ours.)

However, the prerequisites recited in the official order of the Secretary of the Interior are presumed to be true in the absence of proof to the contrary (*Nofire vs. United States,* 164 U. S., 657).

Section 25 of the act of July 1, 1902 (32 Stat., 716), *extended the date of closing the Cherokee roll to September 1, 1902.* Commenting upon the closing of the rolls and of the extension of the time as provided by said section 25, the Commission to the Five Civilized Tribes, in its annual report for June 30, 1903, says:

> "As *this extended the date which had previously been fixed* by the Secretary of the Interior for the closing of the Cherokee rolls, the commission *resumed the hearing of original applications* for enrollment immediately after the ratification of the *agreement was proclaimed.* Between that date, however, and the date upon which the rolls were finally closed *but few applications were received.*" (Italics ours.)

The closing of the roll under the above act of Congress is referred to by this court in the case of *Garfield vs. Goldsby* (211 U. S., 249) as follows:

> "By the act of March 3, 1901 (31 Stat. L., 1077, c. 832), it was provided that the roll made by the Commission to the Five Civilized Tribes as approved

> by the Secretary of the Interior should be final, and authorized the Secretary of the Interior to fix the time, by agreement with the tribes, for the closing of the roll, and upon failure of such agreement, then the Secretary of the Interior should fix the time for the closing of the rolls, and after which no name should be added thereto."

If Congress had the authority, and we contend that it had, to extend the time for the closing of the Cherokee roll by section 25 of the act of July 1, 1902, to September 1, 1902, then it also had the authority by section 2 of the act of April 26, 1906, as amended by act of June 21, 1906, to extend the closing of the roll to March 4, 1906.

But it is urged that the act of July 1, 1902 (32 Stat., 716), was ratified by the Cherokee people and that it was an agreement. The Supreme Court held in the Cherokee Intermarriage cases (203 U. S., 76), commenting upon this same contention, as follows:

> "Counsel for claimants speak of the act of 1902 as a 'treaty,' *but it is only an act of Congress,* and can have no greater effect."

Even if the act of July 1, 1902, because it was ratified by a vote of the citizens of the Cherokee Nation, should be held to be an agreement, still the citizens have no vested rights to enrollment or to unallotted lands or tribal moneys, and Congress could have amended or repealed it whether it be construed as "only an act of Congress," an agreement, or a treaty (Cherokee Tobacco case, 11 Wall., 621; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; *Thomas vs. Gay,* 169 U. S., 264).

Ratification of the act was only necessary because it was one of the conditions imposed by the act. But as decided in the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), Congress could have omitted the condition and no ratification

would have been necessary, and the act would have been a valid exercise of power.

If the act of July 1, 1902, is "only an act of Congress," and by that act the time for closing the Cherokee roll extended from July 1, 1902, to September 1, 1902, why would not Congress by section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, have the authority upon the petition and at the request of the Cherokee Nation to further extend the time for the closing of the Cherokee roll to March 4, 1906? If Congress by act could extend the date for closing the roll to September 1, 1902, it could extend it, as it afterwards, on April 26, 1906, did, to March 4, 1906. In fact, it could have, in the first place, extended it to March 4, 1906, and if so, why did it not have the authority to so extend it by a subsequent act?

The Court of Claims in its opinion (Rec., p. 27) held that by virtue of the act of March 3, 1901, *supra*.

> "The Secretary of the Interior was authorized to and did fix the time for the enrollment as of July 1, 1902, which date was extended by said act of July 1, 1902, to September 1, 1902."

And, further commenting upon the power of Congress to extend the date as of which the Cherokee roll should be made, held:

> "If they could, then, under the act of March 3, 1901, *supra,* they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated, the case here proceeds upon the theory of the validity of the extension to September 1, 1902."

In other words, if the act of April 26, 1906, as amended by the act of June 21, 1906, is unconstitutional because of the extension of the date as of which the Cherokee roll was to be made from September 1, 1902, to March 4, 1906, then

the act of July 1, 1902, is also unconstitutional, because it extended the date as of which the roll should be made from July 1, 1902, to September 1, 1902, for the reason that, as above stated, this court held in the Intermarried White cases (203 U. S., 76) that said act of July 1, 1902, "is only an act of Congress and can have no greater effect."

Appellants Only Represent Themselves.

The appellants in this case do not represent the enrolled members of the Cherokee Nation. They have shown no authority to represent any persons except themselves and are only authorized by the jurisdictional act to institute this suit. The question therefore presented by the act is in reality a moot question, for the children born between September 1, 1902, and March 4, 1906, were admitted at the request of the Cherokee Nation through its council.

(1) The history of Indian tribes in this country shows conclusively that all full-blood Indians are in favor of communal ownership so as to preserve homes for their posterity. This is particularly true of the Cherokee Indians. Section 2, article 1, of the Cherokee constitution provides that "the lands of the Cherokee Nation shall remain common property."

(2) The record in the case of Brown and Gritts shows that the full-blood Cherokees were opposed to the enrollment and allotment of their tribal lands, and in fact were opposed to the passage of the allotment act of July 1, 1902, which is a direct contradiction of the contention that they desire the exclusion of their children in order that their individual shares may be increased, for in communal property all members of the tribe living at the date of its distribution are entitled to share equally.

(3) The Cherokee Nation is and always has been recognized as a distinct political community (193 U. S., 127),

and the National Council, elected by the people an act approved December 4, 1903 (Rec., pp. 155, 156), and by joint resolution approved September 29, 1905 (Rec., pp. 23, 24), requested the enrollment of minor children born since September 1, 1902, and their enrollment was provided for at the request of the accredited representatives of the Cherokee Nation.

(4) The Cherokee Nation has filed a petition of intervention in this case, and represents all of its citizens (Rec., pp. 12, 18).

(5) The record in this case shows that the citizens of the Cherokee Nation are practically unanimous for the enrollment of these minor children (Rec., p. 24).

(6) The Cherokee Nation, anticipating that its tribal government would expire on March 4, 1906, as provided by the act of July 1, 1902, *supra*, and that all of its members, like the heirs of an estate, should share in the tribal property upon the date of the death of the nation, enacted the joint resolution of the National Council to which we have several times referred.

(7) In conclusion, we challenge the right of these appellants to represent the members of the Cherokee Nation, or any of them, without the consent of the nation, over its protest and against its will.

We submit that under the law and the facts, as set forth in this brief, the act should be held constitutional and the judgment of the Court of Claims affirmed.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.